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THE PEOPLE OF ISRAEL VS. JESUS OF NAZARETH

By Robert L. Stearns of the Denver Bar

IT is said that when Voltaire was 83 years old, he became very ill, and a priest was sent to shrive him. Voltaire, who was always sceptical of churches, said to the priest:

"From whom do you come, M. l'Abbe?"

"From God, himself", was the answer.

"Well, well, sir; your credentials?"

I realize my own shortcomings enough to know that I am not qualified as a theologian to discuss this, one of the world's greatest trials, from the standpoint of its religious and ecclesiastical consequences. It is my purpose merely to discuss the trial from a legal standpoint, and remove from consideration, as much as possible, the question of divine origin. I am not intentionally irreverent. I am merely trying to avoid one of the errors common to many of the legal commentators on this subject.

While this is the viewpoint I will ask you to take with me, we must remember that one of the principal charges filed against Jesus was the high crime of blasphemy. The question of guilt or innocence, therefore, depended largely upon whether or not the court believed that the accused was the Son of God. It did not believe the accused, and the death penalty was inflicted. Did the accused receive a fair and impartial trial from a legal standpoint, according to the laws and methods then prevailing among the people of Israel, subject to the Roman sovereignty? To that question, more or less directly, I will endeavor to address myself.

Once upon a time there was a piece of real estate in Asia Minor about 150 miles wide and 300 miles long, pinched in between the Arabian Desert and the Mediterranean Sea.

Over here was Egypt; up at the top was Assyria; over on the east was Babylonia. The Arabian Desert was unsafe for travel. The Great Sea, or the Uttermost Sea, as the Mediterranean was then called, was full of monsters, and the liners did not get much beyond the three mile limit.

Consequently, when one man, or an army, wanted to go from one of these places to the other, he had to cross this little strip of real estate, and for centuries they crossed and re-crossed, conquered and re-conquered this small, but important, Land of Israel, harassing, imprisoning and educating its people. Occasionally, a local hero, like David or Solomon, drove out the invaders and set up a strong local government, only to have it fall before the next invading conqueror.

But this tumultuous history did two things for the people of Israel.

First, it kindled a fervent hope that some day from among their number would step forth a mighty ruler, who would establish a powerful temporal kingdom, and revive the splendors of the House of David and the regal magnificence of King Solomon.

Second, it developed an amazing religious solidarity and fortified their firm conviction that the Egyptians, Assyrians, Persians, Greeks and Romans, with their multifarious deities, were all wrong. Throughout its whole tragic history, the people of Israel clung to their great belief in one God. The whole religious yearning of the race was centered in the God of its worship. Small wonder, therefore, that blasphemy was a heinous crime. Small wonder that one who proclaimed himself king, but wore no royal purple, should get a very cold shoulder; and small wonder that a people anticipating a temporal kingship should fail to be sympathetic with one who promulgated not a code of laws, but a code of living.

In 56 B. C., the late Roman General Pompey defeated the last of the ancient line of Syrian kings, and claimed as his, by conquest, the indefeasible fee simple title to our historic strip of real estate. This resulted in Roman dominion and rule over Judea.

The administration of the country was entrusted to a procurator, who was subordinate to the lieutenant governor of Syria, and this form of administration lasted from the year

6 to the year 41 A. D. Thus, in the year 29 A. D., in which the trial of Jesus and the events which gave rise to it, took place, Jerusalem, the principal city of Judea, belonged to a province of Rome, under the lieutenant governor of Syria, that post being then held by Flaccus Pomponius, the actual government being exercised in the name of Pomponius by a procurator named Pontius Pilate. This was under the reign of Tiberius Caesar.

The Roman conquerors, with admirable foresight, did not undertake to change the local laws of their dominions as to minor offenses. Thus, Pilate was empowered to apply either the Roman law or the local law in any case where the offense was against both the Province and the Empire, as in the crime of murder. In the case of treason, however, with which offense Jesus was likewise charged, Pilate could only apply the law of Rome under the forms of Roman procedure. The nature of the offense must, therefore, be considered in determining the tribunal before which it might properly be tried.

It is extremely difficult to obtain a clear statement of the charges filed against Jesus, from a judicial standpoint. Practically our only source of information is the narrative contained in the four Gospels. The pleadings, as disclosed by the record, are a bit vague, and it is next to impossible to arrive at an understanding of the charges filed, or perhaps I should say hurled, without knowing something of the nature of the people who hurled them.

The Jewish people at this time were divided into factions, based upon their respective prejudices and disposition for political and religious graft. Among these were the Pharisees, who were the religious zealots of the day. They were extremely ritualistic and careful in their observance of religious forms, but it is whispered among the uncharitable, that they used their religion as a mask behind which to hide their corruption. The Sadducees, who were formerly the aristocrats of the day, were the persons from whom were drawn the rulers of the nation before their power was wrested from them by the Roman government. They were quite friendly to the Roman rule, but they had small regard for the people; and their acquisitive proclivities were developed well-

nigh to the point of greed. In matters of religion they were more rationalistic, but they had no great popular following. There were various other factions and parties at the time, but it is sufficient here to say, that Jesus and his followers belonged to no single one of these groups; in fact, his teachings were antagonistic to the doctrines and interest of these factions, thus giving rise to a desire on their part for his destruction, and a concerted movement to accomplish this result.

At first, the Pharisees expressed wonder and astonishment at the teachings of Jesus, but when they saw his popular following and the manner of his reception by the people, they felt their pride as religious leaders had been weakened, and their power and income threatened. At first they did not venture an open rupture with him, but attempted to discredit him among his followers by the time-honored method of heckling. In this, however, they were not successful; but his disregard of their time-honored religious observances and his repeated violations of their blue laws convinced them that he was a dangerous character.

The opposition of the Sadducees apparently had its inception when Jesus cleaned house in the temple. Disturbing the franchises of the vested interests has ever been an effective method of arousing their animosity. This case was no exception.

Then came the arrival of Jesus in Jerusalem on or about the Feast of the Passover, in the year 29. Apparently, the public demonstration was remarkable, and gave strong impetus to the determination of the oppositon for his destruction; but what offense had been committed the opposition was unable to determine. Apparently, therefore, after a consultation among themselves, they sent a deputation to him, to inquire concerning his religious and political views, in the hope that by so doing, they might obtain some incriminating commitment. They inquired, for example: "Is it lawful to give tribute to Caesar, or not?" Had he said "Yes", the Pharisees would have denounced him to the people as an enemy to their liberties. Had he said "No", he would have been brought before Pilate with a charge of treason. His famous answer increased their dilemma: "Render unto Caesar the things which are Caesar's, and unto God the things which are God's."

This process took place from time to time during the next few days, until they determined to apprehend him, apparently on the charge of blasphemy. He was accordingly arrested.

Now, at this time, a brief digression in the narrative is necessary, to describe the Jewish court and code of criminal procedure.

The administration of justice among the Hebrew people was entrusted to three classes of courts. First in point of inferiority was the "Court of Three", which was composed of three judges, one chosen by each party to the litigation, and the third selected by the two thus chosen. No educational qualifications were necessary for membership. An appeal from their determination lay to the minor Sanhedrin, or lower council of laws. These courts existed in every town of more than one hundred families, and consisted of 23 judges, each appointed by the court and Sanhedrin sitting at Jerusalem. They had jurisdiction of lesser crimes and misdemeanors. An appeal would lie from the lesser Sanhedrin to the Great Sanhedrin. This latter court was the supreme tribunal of the Jews. It had original jurisdiction of crimes punishable by death, and of offenses involving the peace and majesty of the people. It consisted of two presiding officers, a religious chamber of 23 priests, a law chamber of 23 scribes, and a popular chamber of 23 elders. Extreme care was taken in the selection. Its sessions were held in Jerusalem, and 23 members constituted a quorum. Under the law, its members could not act prosecutors or accusers, but were required to protect and defend the accused.

A most elaborate system of the protection of an accused person was developed by the Hebrew jurisprudence. Some of these essential points are as follows:

1. The person must be arraigned, the process consisting of reading the charges in open court by the clerk.

2. The charges were based upon an accusation previously made by some person familiar with the facts.

3. Next came the introduction of testimony against the accused, following which an opportunity was given him to offer his defense, and to introduce witnesses in support thereof.

4. Thereupon, one of the judges was supposed to make a summary of the case, and all judges were to proceed to ballot.

5. Two scribes tabulated the votes, one taking down those cast in favor of acquittal, and the other those in favor of conviction.

6. If a majority of the court voted for acquittal, the accused was set at liberty. If a majority voted for conviction, no announcement of the finding could then be made, as at least one day must intervene between the vote of conviction and the pronouncement of the verdict and the sentence.

7. After the proper interval had elapsed, another vote was taken. A judge who had originally voted to condemn might now change his opinion, and vote to acquit; but one who originally voted for acquittal was not permitted to change his opinion and now vote for a conviction.

8. Under the law, it was the duty of the court to defend the accused, and a verdict of guilty, without some member of the court having interposed a defense, was invalid.

9. The court was prohibited by law from entering upon the trial of a criminal case on Friday, for the reason that such trial could not be conducted on the Sabbath, nor could it be postponed over the Sabbath.

10. Any indignities inflicted upon the accused during the progress of his trial subjected those who committed them to the same punishment as if they were inflicted upon one who was not accused.

Many other and similar refinements could be noted.

The Professor of Religious History at Harvard, Moore, has written an interesting work on Judaism, wherein he speaks of these unusual and stringent limitations as follows:

"It is clear that with such a procedure, conviction in capital cases was next to impossible, and that this was the intention of the framers of the rules is equally plain. The Mishna itself brands a court which executes one man in seven years as ruinous. (Jewish Talmud, Mishna X: The Sanhedrin who executes a person once in seven years is considered pernicious.) It should be observed, however, that when the court was convinced of the guilt of the accused, though the evidence did not warrant his conviction, they might imprison him on bread and water (Mishna, Sanhedrin, 9, 5). * * * It cannot be imagined that any government charged with the maintenance of public order and security ever devised and put into practice a code of procedure the effect and intent of which was to make the conviction of criminals impossible."

The limitations to the jurisdiction of the Sanhedrin above referred to are contained in the Talmud as we know it today.

But the Talmud as we know it today is the outgrowth of the results of the collaboration of numerous rabbis, and was not completed until approximately 500 A. D. We cannot, therefore, say with certainty that the method of procedure now set out in the Talmud was the method of procedure in vogue in 29 A. D. Upon this point Professor Moore says:

"The inquiry whether the trial of Jesus was 'legal', i. e., whether it conformed to the rules in the Mishna, is futile, because it assumes that those rules represent a judicial procedure of the Old Sanhedrin."

Practically all of the commentators who have discussed this subject from the legal standpoint, assume, however, that the procedure laid down in the Talmud as now known to us was in effect at the time of the trial of Jesus. I shall make the same assumption, because I am unable to prove the contrary.

Assuming, therefore, that these rules of procedure did govern the Jews in the trial of capital cases in 29 A. D., did they comply with these requirements in the instant case? This takes us back to our historical narrative, the general order of events of which are this:

1. He was led to Annas.
2. He was sent by Annas to Caiaphas, the high priest.
3. He was there brought before the Sanhedrin, tried and condemned.

Annas was the father-in-law of Caiaphas, who was the high priest, and apparently a man of considerable standing in the community. If he should approve the condemnation of Jesus, his approval would go a long way toward strengthening the backbone of the opposition. The appearance before Annas was an extra-legal process, as he had no official position with the Sanhedrin. Apparently the trial met with the approval of this man, for the accused was thereupon led to Caiaphas. According to the version of St. John:

"Now, Caiaphas was he who had given the counsel to the Jews; that it was expedient that one man should die for the people."

The high priest then asked Jesus concerning his doctrine. The examination proceeded immediately to the crux of the case, so far as the Jews were concerned, and was based upon the ground of blasphemy. It must be borne in mind that the Jewish commonwealth was a pure theocracy. The Old Testa-

ment teachings, the Ten Commandments and the Mishna, had for them the finality of authority far beyond the pronouncements of any temporal monarch. In Leviticus we read: "You shall not profane my holy name; and I will be hallowed among the children of Israel". In Genesis we read: "I am the Lord thy God. They shall have no other gods before me". In Isaiah we read: "I am the first and I am the last; and beside me there is no God". And many other places emphasize the terrific importance of this to the Jewish mind. The profanation of the Name was a heinous crime, so terrible that it was extremely difficult of atonement. Rabbi Ishmael taught that while all other classes of sins may be atoned for according to their heinousness, by repentance, by the Day of Atonement, by the chastisements cumulatively, yet not all, together, sufficed to atone, for the man through whom such Name is profaned. Such guilt is only wiped out by death.

Therefore, in answer to the inquiry concerning his doctrine Jesus said: "I have spoken openly to the world; I have always taught in the synagogue and in the temple, whither all Jews resort; and in secret I have spoken nothing."

Then it occurs to him that perhaps it might be in order for the prosecution to call a few witnesses, and he says:

"Why askest thou me? Ask them who have heard that I have spoken unto them; behold, they know what things I have said;"

at which juncture he receives a blow from the bailiff, with the rhetorical question: "Answerest thou the high priest so?"

Thereupon, further testimony was adduced, and one of the witnesses said: "This man said, I am able to destroy the temple of God and after three days to rebuild it."

Then the high priest came directly to the point, and he inquired: "I adjure thee by the living God that thou tell us if thou be the Christ, the son of God." Jesus said to him: "Thou hast said it." In other words, he made a direct affirmative answer to the categorical inquiry.

Then the high priest rent his garments. The rending of garments seems to be an expensive pastime indulged in by the high priest as a symbol that a blasphemous profanation of the Name has been uttered. The ballot was by acclamation. Before putting the matter to a vote, however, the high priest expressed himself rather strongly in favor of conviction. He

said: "He hath blasphemed; what further need have we of witnesses? Behold, now, you have heard the blasphemer, what think you?" They answered and said: "He is guilty of death."

This first trial before the Sanhedrin was concluded about three o'clock in the morning of Friday. We have seen under the Jewish Code, that in capital cases the death sentence could not be pronounced until one full day had elapsed. We have also seen that the trial of a capital case could not be commenced on Friday. However, it was the obvious desire of the prosecution to get this matter over with, and accordingly, they re-convened at daybreak on this same Friday. This second hearing was a perfunctory affair, in order to attempt a compliance with the requirements of the code. At this time, again, Jesus was interrogated, although no further witnesses were brought forward. There seems to be no question but that between these two trials, one ending at three o'clock in the morning, and the other commencing at daybreak, the prisoner was subjected to a considerable amount of insult, violence and indignity.

It does not specifically appear that any of the members of the Sanhedrin undertook to speak in his defense at either trial. In his book on the Martyrdom of Jesus, Rabbi Wise says if none of the judges defended the culprit, the verdict was invalid. At least two of the historians assert that Gamaliel the Ancient and Rabbi Naravi both undertook to defend the accused. According to these historians, these two were the only ones who voted for an acquittal. According to the Bible narrative, not even these two voted for acquittal. The statement is, "And they all condemned him to be guilty of death".

Now, under the rule in the Talmud, the death penalty might be inflicted upon a blasphemer in any one of four different ways:

Burning,
Stoning,
Strangling,
Beheading.

But Josephus tells us that the Jews lost their power to inflict capital punishment in the year 6 A. D., when Judea formally

became a Roman province. Moreover, you will note that crucifixion was not among the forms of death prescribed for a blasphemer by the Talmud, but it was the form of execution then in vogue among the Romans.

After the verdict of the Sanhedrin, the court adjourned to the Roman Procurator. Now, it would seem that this appeal to the Roman jurisdiction must have been based upon a recognition of the Roman supremacy. This was a trial *de novo*. His jurisdiction was plenary. His duty was to inquire into the accusation made, and determine from all the facts and circumstances whether the prisoner was guilty of an offense punishable under the Roman law. If the crime was not one recognized by the Roman law, it became the duty of the procurator to refuse to proceed further with the case, and to acquit the prisoner. Pilate proceeds, in a thoroughly judicial attitude. His first inquiry is:

"What accusation bring ye against this man?"

Very well; what accusation? He has been tried and convicted of blasphemy before the Sanhedrin; but to blaspheme the God of the Jews was not an offense against the Roman order. Apparently at a loss for a specific charge, the priests announced: "If he were not a malefactor, we would not have delivered him up unto thee". Apparently they thought this might be sufficient for the Roman governor; but Pilate seems to have been a man of more than ordinary judicial discernment. He said: "Take him, and judge him according to thy law"; whereupon the Jews were forced to admit their lack of power, for they said: "It is not lawful for us to put any man to death."

Thereupon, they advanced a new charge. The critics judge them harshly for this, but I am not sure that they deserve this harsh judgment. It strikes me that they were putting a different interpretation upon the same offense. The offense which to them was blasphemy, because it identified Jesus with the Deity, became now treason against the Roman order, because it made Jesus the King of the Jews. They said: "We found this fellow perverting the nation, forbidding to give tribute to Cesar, saying, I am Christ the King". If this charge were true, it constituted an offense against the Roman order.

From what we know of the character of Jesus and his teachings with reference to submission to authority, it was probably not true, but Pilate proceeded with his inquiry, and said to Jesus: "Art thou the King of the Jews?" Thereupon Jesus asked him: "Sayest thou this thing of thyself, or did others tell it thee of me?" It seems reasonable for him to inquire as to whether or not the charge came from the Roman or the Jewish standpoint.

Thereupon Pilate replied: "Am I a Jew? Thy own nation and the chief priests delivered thee unto me."

Then Jesus answered in a manner that clearly indicated he made no pretension to temporal power. He stated: "My kingdom is not of this world." Whereupon Pilate inquired: "Art thou then a king?" Whereupon Jesus again emphasized the fact that he was attempting to distinguish between the foundation of a faith and the foundation of an empire. He said:

"Thou sayest I am a king. To this end was I born, and for this cause came I into the world, that I should bear witness unto the truth."

In the light of religious teachings, we have come to be amazed by the spiritual insight of these utterances; but to Pilate, who was a ruler of blood and iron, submitting only to the authority of the Roman Empire these words did not convey a great deal. He thereupon inquired: "What is truth?" History has long debated the mental attitude of Pilate at the time of making this inquiry. Tertullian concludes that he was already in conviction a Christian. Bacon concludes that he was a jesting Pilate, and asked the question for rhetorical effect. Certainly, he did not wait for an answer, but proceeded forthwith to a verdict of acquittal. He said: "I find no crime in him."

Up to this time, the procedure as conducted by Pilate was in conformity with Roman law. Pilate had given Jesus a preliminary hearing, and had fearlessly pronounced the judgment of acquittal. Professor Greenleaf, the authority on evidence, says:

"Here was a sentence of acquittal, judicially pronounced, and irreversible except by higher power upon appeal; and it was the duty of Pilate thereupon to have discharged him."

The prosecution, however, did not desire to leave the matter in this condition. They brought forth a new statement:

"He stirreth up the people teaching throughout all Jewry, beginning from Galilee to this place." At the suggestion of the place Galilee, Pilate, in spite of his judgment of acquittal, considers on his own motion the matter of change of venue. It so happens that at this time Herod Antipas, the tetrarch of Galilee, is in Jerusalem in attendance upon the feasts. Obtaining from Jesus the admission that he is a Galilean, he sent the prisoner over to Herod's palace. Here the prosecution renewed its charges of treason and sedition.

Now, Herod, as tetrarch of Galilee, had jurisdiction of offenses committed in Galilee. Inasmuch as the chief scene of Jesus' teachings had been in the vicinity of Galilee, it might have been proper that the trial take place before Herod, had not Pilate previously assumed jurisdiction and undertaken to acquit the accused. In this second Roman trial, in the words of St. Luke, Herod "questioned him in many words" — a method of interrogation not unknown even in these days. But Jesus "answered him nothing". Apparently he preferred to stand upon his constitutional rights. At this point the trial seems to amuse Herod vastly, and he proceeds to make a joke of the affair. According to the Gospel narrative, "Herod with his army set him at naught, and mocked him, putting on him a white garment, and sent him back to Pilate".

You will observe that here is no conviction; in fact, it is another acquittal. The prosecution then appears a second time with the accused before the Roman procurator. And Pilate, "calling together the chief priests and the magistrates and the people, said to them: You have presented unto me this man, as one that perverteth the people; and behold, I having examined him before you, find no cause in this man in those things wherein you accuse him. No, nor Herod neither. For I sent you to him, and behold, nothing worthy of death is done to him. I will chastise him, therefore, and release him."

This unquestionably constitutes the third consecutive acquittal before the Roman tribunal. But why chastise an innocent man? Evidently this was a sop thrown to the populace in order to appease their clamor.

The record here says, "From thenceforth Pilate sought to release him".

Jesus was then taken over to the barrack room of the guards. I think many of you will bear me out, that in practically every barrack room there are anywhere from one to a dozen practical jokers. The fact that this poor, bedraggled prisoner proclaimed himself a king, seems to have given rise to much merry-making. With mock solemnity they arrayed him in a purple garment, and plaited a crown of thorns in wanton mockery of the imperial laurel. They bowed before him with mock obeisance, and tendered homage in the form of blows and scourges. He was then brought before the howling populace.

At this point unquestionably Pilate's heart was touched, and he uttered the now famous words, "Behold the man!"—apparently an effort to enlist the sympathies of the aroused multitude. To small effect, however, because they continued their demands for crucifixion. Pilate then said: "Behold, I bring him forth unto you, that you may know that I find no cause in him." This appears to be a fourth affirmation by a Roman official of the fact of proven innocence.

Again they cried for the blood of their appointed victim, and turning away in disgust, Pilate said to them: "Take ye him and crucify him, for I find no fault in him"—(a fifth affirmation of innocence). Thereupon he was taken to the appointed place and crucified.

Thus we have seen in the short space of a few hours the accused subjected to two trials before the regularly constituted Jewish tribunal, and two trials and a rehearing before the regularly constituted Roman tribunal. Much has been said as to the legality of these trials, and much has been said as to the illegality of them. The following are the principal points which are asserted as grounds for the conclusion that the Jewish trial was illegal:

1. The trial was illegal because the arrest was illegal. The arrest took place at night, which was in violation of the Hebrew law. It was effected through the agency of a traitor and an informer, in violation of the Mosaic code.

2. The trial was illegal because Jesus was not permitted to show whether or not he was, in fact, the Messiah.

3. The trial was illegal because Jesus was found guilty on his own confession. Caiaphas, you will recall, said: "What

further need have we of witnesses? Ye have heard the blasphemer."

4. The trial was illegal because the Sanhedrin had previously decided that Jesus must die. This was apparently done in the preceding February, at a very interesting meeting when the activities of Jesus were the subject of a hot discussion. At this point it is reported that one of the more level-headed brethren, by the name of Nicodemus, arose and said: "Doth our law judge any man before it hear him and know what he doth?" Apparently the chief priests and the elders were somewhat confounded by this query.

5. The trial was illegal because the judges were prejudiced.

6. The trial was illegal, because it was conducted at night.

7. The trial was illegal because it was conducted on the day before the Sabbath, and on a feast day.

8. The trial was illegal because the actions of the High Priest were prejudical.

The following are the principal points which are asserted as the ground for the conclusion that the Roman trial was illegal:

1. That Jesus had already been acquitted on the charge on which he was tried.

2. That Pilate was intimidated by the mob.

It has been very easy for men to justify the conclusion which they desired to reach in this case. They have said that the trial was illegal because they felt that an innocent man was executed.

Considered from the standpoint of the Jews, with their racial and religious background and their feeling of revulsion against what they regarded as blasphemy, I am of the opinion that a fair and impartial hearing was not had. As to whether or not the trial was "legal", namely was in conformity with the laws and practices of the Jewish Commonwealth, a sound conclusion cannot be reached by merely reading the Mishna. It is first necessary to determine which of the rules prescribed in the Mishna were in effect in the year 29 A. D. If the rules that now appear in the Mishna were in effect at that time, I am satisfied that a legal conviction was an impossibility.

But the situation is different with Pontius Pilate. He was a Governor charged with the duty of maintaining order in his Province. He interrogated and tried the accused. He found him guiltless and pronounced a judgment of acquittal. He reiterated this conclusion some three or four times and then permitted the execution of a prisoner whom he had repeatedly declared to be innocent. I am convinced in my own mind that he is responsible for the act which History has condemned.

But analyze the case as we may from a legal standpoint, I think we will come at last to the conclusion that whatever crime was committed was a political crime, resulting in a political trial terminating in an execution inspired by motives of political expediency. Perhaps the most difficult class of cases with which the legal profession has to contend. The accusers are inflamed, the seriousness of the crime is magnified and the Judges, consciously or unconsciously, are biased and intimidated. Rare indeed is the outcome a satisfactory one.

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

APPEAL AND ERROR—DISTRICT COURT RULES—No. 12,257—*Halter vs. Wade—Decided December 31, 1928.*

Facts.—Halter, a debtor under a judgment rendered by the District Court of the City and County of Denver was, on December 30, 1927, allowed sixty days for tendering a bill of exceptions and no extension of time was given. The bill was tendered to the trial judge February 15, 1928, but was not lodged with the clerk of the Court until March 7, 1928. Notice of this lodging was served on counsel for defendant in error March 24, 1928. A rule of the Denver District Court requires that bill shall be lodged with the clerk immediately, and shall forthwith notify the opposite party, or his attorney. Wade has moved to strike the bill of exceptions.

Held.—The rule of the District Court has the force and effect of a statute. It is not in conflict with any other rule or law and must be observed. Plaintiff in error has not complied; the bill of exceptions must be stricken.

Motion to strike granted.

DIVORCE—ENTRY OF DECREE—STATUTORY CONSTRUCTION—No. 12,200—*Walton vs. Walton—Decided March 4, 1929.*

Facts.—Plaintiff below, defendant here, filed a complaint praying for a divorce and charging defendant below with cruelty and desertion. Defendant filed a cross complaint charging the plaintiff with cruelty, and seeking a decree of separate maintenance. Plaintiff withdrew his complaint; defendant amended her cross complaint to pray for an absolute divorce. The case was heard as a non-contested matter and an interlocutory decree was entered against the plaintiff in favor of the defendant. More than six months later the defendant filed a motion to set aside the findings of fact and con-

clusions of law, to which the plaintiff answered requesting that the cause be set down for hearing and trial upon the terms of alimony, and also praying that a decree of divorce be granted the defendant. The Court modified the property settlement and upon the plaintiff's application, entered a decree of divorce in favor of the defendant, under Chapter 90 S.L. 1925.

Held.—1—The Court had jurisdiction to modify the property settlement; 2—the Court erred in entering the decree at the plaintiff's request and over the defendant's protest because (a) the legislature does not have power to require a court of equity to grant a decree of divorce upon the application of the guilty party; (b) the act under which the decree was entered is in violation of Article 3 of the State Constitution, and (c) the act of entering the decree is not merely a matter of procedure; but even if it were, the legislature has placed such matters under the jurisdiction of the Supreme Court by vesting it with power to make rules of practice and procedure, (S.L. 1913, page 447, Chapter 121). Parsons vs. Parsons, 70 Colorado 154, 198 Pacific is overruled.

Judgment affirmed in part and reversed in part.

USURY—ESTOPPEL OF BORROWER—No. 12,042—*Nikkel vs. Lindhorst—Decided March 11, 1929.*

Facts.—Nikkel, a lawyer, obtained a loan of $80.00 from Lindhorst's assignor, and filled in a blank note form so that it provided for interest at 8% per annum to maturity, and 2% per month thereafter. When the note was not paid Lindhorst brought suit and Nikkel defended on the grounds of usury under C.L. 1921, Section 3797.

Held.—The provision for the alleged usurious interest was inserted in the note by Nikkel fraudulently and without the lender's knowledge. Nikkel is, therefore, estopped to maintain his defense.

Judgment affirmed.

CREDITOR'S BILL—MARSHALLING ASSETS—ATTORNEY'S FEES 12,017—*Legge vs. Peterson—Decided April 15, 1929.*

Facts.—This is an equitable action in the nature of a creditor's bill. Plaintiff below procured judgment against her

tenant and after execution was returned unsatisfied brought this action against tenant and bank. Court below marshalled assets and allowed bank attorney's fees.

Held.—(1) Before the doctrine of marshalling assets will be applied there must be two funds or properties at the time the equitable relief is sought belonging to the common debtor of both creditors on both of which funds one party has a claim or lien and on one only of which the other party has a claim or lien.

(2) Attorney's fees cannot be allowed on note in the absence of evidence as to the reasonableness of the fees and absence of evidence that holder of the note had incurred any liability for or paid any attorney's fees.

(3) Cost of harvesting should have been charged one-half to lessor and one-half to lessee.

(4) There is no evidence upon which fraud or conspiracy could be predicated.

Judgment modified and affirmed.

CRIMINAL LAW—LIQUOR—EVIDENCE—No. 12,113—*Wilder vs. The People—Decided April 29, 1929.*

Facts.—Defendant below was convicted of violating the liquor law on three counts, on the charge of possession, operation, and ownership of a still for the manufacture of intoxicating liquor.

Held.—Motion for change of venue properly denied. Evidence of advice of counsel goes only to the question of intent on the charge of operating a still. The extent to which a defendant testifying in his own behalf may give to the jury his life's history, not directly connected with the charge, is generally discretionary with the trial court. Verdict of the jury on each count is supported by the evidence.

Judgment affirmed.

BILLS AND NOTES—INNOCENT PURCHASER—No. 12,139—*Stewart vs. Public Industrial Bank—Decided April 29, 1929.*

Facts.—Public Industrial Bank recovered judgment against Stewart on a promissory note acquired by the bank

from the original payee before maturity. Claimed that note was non-negotiable because it contained a clause authorizing attorney to confess judgment.

Held.—Evidence sufficient to support finding that the bank was a bona fide owner of the note, having purchased it in due course. Inclusion in the note of the clause empowering attorney to confess judgment did not render the note non-negotiable.

Judgment affirmed.

BILLS AND NOTES—FORECLOSURE—DENIAL OF EXECUTION COMPARISON OF WRITING—No. 12,109—*Wilson vs. Scroggs —Decided April 29, 1929.*

Facts.—This is a foreclosure suit. Defendant filed answer denying execution of note and denying consideration. At trial plaintiff sought to introduce other notes and deeds of defendant for comparison of signatures. This evidence was denied by court below.

Held.—Court should have allowed the introduction of all evidence which tended to establish the genuineness of the signatures offered as a basis of comparison; should have determined, as a matter of law, whether or not that proof was sufficient to establish the authenticity of the defendant's signature upon them; and if this was done to his satisfaction, should have admitted the exhibits as standards of comparison to be used by the experts as well as the jury.

Reversed and remanded.

PATENT RIGHTS—EQUITY—FORFEITURE—No. 12,091—*The Operative Service Corporation vs. McIntyre Pump Company—Decided April 29, 1929.*

Facts.—McIntyre Pump Company, the owner of certain patent rights, sold and assigned the patent rights to the defendant below with the exclusive right to manufacture on a royalty basis. Contract provided for forfeiture in the event of failure to manufacture and pay royalties. Defendant defaulted.

Held.—Courts of equity have jurisdiction to rescind and cancel contracts where facts are established which clearly show

that the injury caused by the breach is irreparable and that damages are wholly inadequate.

Affirmed.

DRUGS — NON-SUIT—NEGLIGENCE—No. 12,074— *Campbell vs. Stamper Drug Company—Decided April 29, 1929.*

Facts.—Lower court directed verdict for the defendant. Deceased went into drug store and called for quinine. The clerk gave him strychnine, which caused his death.

Held.—Court below erred in holding that plaintiff and deceased were guilty of contributory negligence as a matter of law in failing to determine that the bottle delivered by the defendant's clerk contained strychnine instead of quinine. Proof of the violation of the druggist's statute is sufficient to make out a prima facie case of negligence against the defendant. The question of contributory negligence under the facts and evidence was for the jury.

Reversed.

ACCIDENT INSURANCE — AGE — WARRANTY — No. 12,284— *Western Casualty Company vs. Aarons—Decided May 6, 1929.*

Facts.—Plaintiff below, the assignee of Fannie M. Parker, had judgment against the Insurance Company for $120.00, being the amount paid to defendant on account of premiums for twelve years on an accident insurance policy. Parker, in her application, represented she was fifty-four years old, when in fact she was over sixty. She continued to pay premiums for twelve years. This suit was brought to recover the premiums paid on the theory that by this misrepresentation in regard to her age the policy was void and she was entitled to have the premiums returned.

Held.—The policy was voidable and not void. The company, having accepted the premiums over a period of years, waived its right to avoid the policy. The insured, having misrepresented her age but, nevertheless, for a period of twelve years, having the benefit of the insurance policy, cannot assert that the policy was void and that she is entitled to the premiums paid thereunder.

Judgment reversed.

WATER RIGHTS—PRIORITIES—No. 12,040—*In the Matter of Adjudication of Priorities, etc. vs. The Arkansas Valley Sugar Beet and Irrigated Land Company, et al—Decided May 6, 1929.*

Facts.—This is a review of a decree of the District Court of Bent County rendered February 3, 1927, in a statutory proceeding for adjudicating water rights in water district, No. 17, Division No. 2, both for direct irrigation and storage. It is the same Decree which was considered by this Court in Holbrook District versus Fort Lyon Company, 84 Colorado 174. The records show that there have been several adjudications in this district. The court below reopened the Water Right Decree on August 30, 1922, and entered a new decree.

Held.—The lower court had a right to reopen the decree. Plaintiffs, in the action now under review, themselves had also asked the trial court to reopen the earlier decree as the Holbrook District did. Therefore, Plaintiffs may not now complain of the very thing which they, themselves, asked to have done. Priorities, as fixed by the court below, were proper.

Judgment affirmed.

BODY EXECUTION—TIME LIMIT—TIME OF CONFINEMENT—No. 12,332—*Roll vs. Davis—Decided May 13, 1929.*

Facts.—Roll complains of the ruling of the trial court denying his motion to quash and recall writ of body execution. Body execution was issued two and one-half years after judgment, but during all of that time Roll was confined in the penitentiary under a criminal charge.

Held.—Delay in issuing body execution was excusable where the judgment debtor was confined in the penitentiary during the entire period from the entry of the judgment to the time of issuing execution. Body execution should not be quashed because of imprisonment for another wrong. Where the judgment was that Roll should be confined for a period not to exceed one year, or until the further order of the court, or until the amount of the judgment has been paid, such judgment is sufficiently definite. The Sheriff of the City and County of Denver had the authority to take possession of Roll's body in another county.

Judgment affirmed.

EQUITY—FORECLOSURE—ACTION AT LAW—No. 12,321—*The Fairview Mining Corporation vs. American Mines & Smelting Company—Decided May 20, 1929.*

Facts.—The grantors of American Mines & Smelting Company gave to Allen Burris, the grantor of The Fairview Mining Corporation, a mining lease and option to buy certain properties. Under this option, various payments were made and a number of extensions of time for payment were granted. Aggregate payments of more than $85,000.00 were made. Plaintiff below brought suit at law to recover possession of the property.

Held.—The facts pleaded in the answer showed an equitable defense. The grantors in the contract retained title to the property as security for payment of the agreed purchase price. The relations between the parties are the same as if title had passed from the grantor to the grantee, and the latter had conveyed the title back as security for payment. Plaintiff was wrong in resorting to an action at law for the recovery of possession. The plaintiff should have employed the equitable remedy of foreclosure and sale.

Judgment reversed and remanded.

FIRE INSURANCE—AUTOMOBILES—APPRAISAL CLAUSE—No. 12,318—*St. Paul Fire & Marine Insurance Company vs. The Walsenburg Land & Development Company* — and No. 12,319—*The Sun Insurance Office vs. Tressler—Decided May 20, 1929.*

Facts.—These two cases were consolidated for trial. The plaintiffs below each were owners of automobiles which were insured by the defendants below against fire. Both automobiles were wholly destroyed in a fire. Because of failure of the parties to agree on the damages, appraisers were appointed under a provision in the policies, to appraise the loss. The appraisers met and made an award without giving the plaintiffs below an opportunity to present any evidence as to the value of the cars. Judgment below was for the plaintiffs below.

Held.—The attempted appraisal of the value of the property destroyed was a nullity by reason of the fact that the plain-

tiffs were given no opportunity to appear before the board of appraisers at the time the appraisement was made. Every man has a right to be heard before judgment. Of course, he may waive that right, but the appraisal clause in these insurance policies was not such a waiver of this right. In this case both cars were totally destroyed; the appraiser had no knowledge of their value; and the owners of the cars should have been given the opportunity of presenting evidence of the value. Without such opportunity no hearing was had within the meaning of the law.

Judgment affirmed.

WATER AND WATER RIGHTS—CHANGE OF PARTIES—DELAY—No. 10,623—*The Northern Colorado Irrigation Company vs. The City and County of Denver Decided May 20, 1929.*

Facts.—This case was docketed in the Supreme Court six years ago. Through stipulation of the parties for various continuances, but through no fault of the Court, the case was unnecessarily delayed. In 1924 the plaintiff in error dismissed the case, and in 1927 other parties moved to reinstate and reopen, which was granted. It appears that in the trial below all claims presented were not determined.

Held.—That cause should be reversed because the court below failed to determine all claims presented. The rights of various water claimants have been seriously inconvenienced by the long delays which are caused by counsel and not by this court, and the court will enforce the rule that requests for delays, even when accompanied by a stipulation, must show sufficient reasons for extension of time.

Judgment reversed.

OIL—CONTRACTS—INDIAN LANDS—No. 12,003—*Pierce vs. Marland Oil Company—Decided May 20, 1929.*

Facts.—Pierce and McCall, plaintiffs below, brought action against Marland Oil Company of Colorado to recover damages for alleged breach of contract, to which several defenses were interposed, one of which was that there was no contract between the parties. The court below held that although extensive negotiations had been carried on, neverthe-

less that there was no completed contract, and on this ground granted a non-suit.

Held.—The evidence plainly shows there was no completed contract between the parties. Among other things, the vendors were to assign to Marland Oil Company certain leases they held on Indian Land. The evidence failed to show that the consent of the Secretary of the Interior to such assignments which was necessary in order to make a valid assignment had been obtained. The vendors failed to show that they were in a position to make the transfer.

Judgment affirmed.

AUTOMOBILES—POSSESSION—TITLE—No. 12,306—*The South Denver Bank vs. The Guardian Trust Company—Decided May 27, 1929.*

Facts.—This was an action by The South Denver Bank to recover from The Guardian Trust Company, as Administrator of the estate of Clarke, the possession of an automobile. The court below sustained defendant's motion for non-suit. The automobile was in possession of Clarke at the time of his death. The defendant trust company qualified as administrator and took possession thereof and was in possession at the time of the trial. A party by the name of Stanton gave a chattel mortgage on this same automobile to The South Denver Bank to secure a loan of $1800.00. There was no evidence to show that Stanton ever had title.

Held.—There was no evidence tending to show either ownership or right of possession in Stanton or in The South Denver Bank to this automobile.

Judgment affirmed.

ASSAULT AND BATTERY—INSUFFICIENT EVIDENCE—No. 12,148—*Osgood vs. The People—Decided May 27, 1929.*

Held.—Mrs. Osgood was convicted of assault and battery on an information in two counts, the first of which charged the defendant and one Phillips with an assault with a deadly weapon, and the second charging the defendant and Phillips with assault and battery. Phillips, who was Mrs. Osgood's chauffeur, engaged in a fist fight with another person in the

country. Mrs. Osgood, becoming alarmed for her safety, picked up a revolver that was in the car, got out of the car and pointed the revolver at a bystander who was not engaged in the fight. The bystander told her he had nothing to do with it, whereupon she expressed regret and apologized. She is not convicted for assault upon the bystander, but for assault upon the person who was fighting with Phillips.

Held.—There was no evidence justifying such a conviction. The defendant did exactly what any prudent and reasonable person would have done under all the circumstances of the case, and when she discovered her mistake, she explained her actions and promptly apologized.

Judgment reversed.

CONTRACTS—REAL ESTATE—UNILATERAL CONTRACT — ACCEPTANCE—No. 12,142 — *Morath vs. Perkins — Decided May 27, 1929.*

Facts.—Morath, a real estate salesman, sued Perkins and wife to recover judgment of $38,000.00, as damages for the failure of defendant to carry out the provisions of an alleged contract for the sale of defendant's real estate to plaintiff. The Court below directed a verdict for the defendant on the ground that the alleged contract in question was an offer to sell and that it had not been accepted by the plaintiff.

Held.—1. The contract involved was merely an offer to sell and was unilateral.

2. The evidence was not sufficient to show an acceptance.

Judgment affirmed.

FORECLOSURE—LACHES—No. 12,240—*Conrad vs. Scott—Decided May 27, 1929.*

Facts.—Conrad sued Scott to foreclose the lien of a Deed of Trust dated February 1, 1888, and given to secure the payment of a note of $300.00 of even date, payable in five years. Among the defenses was that of laches. The court below held Conrad guilty of laches and dismissed the suit.

Held.—Lapse of time is an important element of laches. Yet, unless a case falls within the operation of the Statute of Limitations, there is no such period within which a person

must assert his claim or be barred by laches. Delay alone is not laches. Scott purchased the property subject to the Deed of Trust and had paid no part of the principal or interest of the note secured thereby. To hold that Conrad cannot be permitted to foreclosure the lien of the Deed of Trust would operate to cancel a just debt which Scott should pay.

Judgment reversed.

DEEDS—REFORMATION—SUBSEQUENT GRANTEE—No. 12,117 —*Waters vs. Massey-Harris Harvester Company—Decided May 27, 1929.*

Facts.—The Harvester Company, a judgment creditor of Waters, sued Waters and his wife to reform a deed executed by the latter to her husband so as to include the property intended to be conveyed, instead of that described in the deed. The erroneous description arose through a mutual mistake of the parties thereto. A demurrer was overruled and defendant elected to stand upon the demurrer. The Harvester Company was not a party to the deed.

Held.—Since the grantee of a grantee in a deed containing a misdescription caused by mutual mistake cannot maintain an action to reform the deed, merely because he is a grantee neither can a judgment creditor.

Judgment reversed.

WORKMAN'S COMPENSATION—RISKS COVERED BY INSURANCE POLICY—No. 12,114—*Smart, et al, vs. Radetsky—Decided May 27, 1929.*

Facts.—The Industrial Commission awarded compensation to Smart and one other against Radetsky and the insurance company. It was claimed below that the risk was not covered by the insurance policy. The insurance policy was issued for a junk dealer, but provided the general coverage for other business operations. The employees were injured in dismantling a sugar plant and not upon work carried on by a junk dealer.

Held.—The insured had been engaged in dismantling abandoned plants for years to the knowledge of the insurance company. Dealing in old machinery constitutes second-hand

machinery business and not junk business, and, therefore, the clause in the policy under the heading of other business operations would cover this vocation.

Judgment affirmed.

ROADS—PRIVATE WAY—RAILROAD RIGHT-OF-WAY—No. 12,072—*The Denver & Salt Lake Railway Company vs. The Pacific Lumber Company—Decided May 27, 1929.*

Facts—This was an action by The Pacific Lumber Company against the railroad company to restrain the defendant railroad company from interfering with plaintiff's use of a private crossing over the defendant's railroad track where it passes across the plaintiff's patented land. The railroad right-of-way was acquired from the United States before any patent was issued to the plaintiff or his grantors for this land. The lower court entered an order prohibiting any interference by the railroad company with the plaintiff's use of the crossing.

Held—The right-of-way granted the railroad company by Act of Congress was more than a mere easement. It amounts to a qualified or limited fee, and so long as defendant railway company maintains its line of road it has the right of exclusive use and possession of its right-of-way. This not being a public highway crossing, the plaintiff acquired no right in the private crossing by estoppel.

Judgment reversed.

CRIMINAL LAW—MURDER — CIRCUMSTANTIAL EVIDENCE — No. 12,327—*Ives vs. The People—Decided June 3, 1929.*

Facts.—Ives was found guilty of murder in the first degree and the jury fixed the penalty of death. Judgment was pronounced in accordance with the verdict.

Held.—1. The evidence was not circumstantial. Under our statutes the death penalty could be fixed for the commission of a crime.

2. The evidence was sufficient to support the verdict.

3. The newly discovered evidence was not sufficient to warrant the granting of a new trial.

Judgment affirmed.

PROMISSORY NOTE—COGNOVIT—DEFAULT JUDGMENT—No. 12,092—*Peterson vs. Vanderlip—Decided June 3, 1929.*

Facts.—Action was brought to set aside and vacate a former judgment on a cognovit note where there was no service of summons, and the defendant did not appear at the trial in person or by an attorney of his own selection, and an attorney, not the defendant's attorney, appeared and confessed judgment in the principal of the note and interest then due. The note had already been paid before suit was brought on it.

Held.—The note, having been paid before this action was instituted, the conduct of the plaintiff in bringing suit upon the note and obtaining judgment was a fraud upon the court and its jurisdiction, and a willful abuse of legal process to accomplish an unworthy and illegal end. The judgment was unjust and should be vacated and set aside.

Judgment affirmed.

REPLEVIN—BURDEN OF PROOF—No. 12,102—*McAlpine vs. McAlpine—Decided June 3, 1929.*

Facts.—McAlpine sued her former daughter-in-law, McAlpine, to recover several articles of jewelry. The case was tried to the court without a jury. The findings and judgment were for the defendant.

Held.—1. The evidence was sufficient to support the findings and judgment.

2. The burden of proof was properly placed upon the plaintiff. Defendant's claim that the jewelry was given by the plaintiff to her son, and by the son to the defendant as a wedding present, is not an affirmative defense.

Judgment affirmed.

BANKS—CERTIFICATE OF DEPOSIT— LOSS —INTEREST — No. 12,158—*LeZotte vs. Bank of Del Norte—Decided June 3, 1929.*

Fact.—In 1921 Mrs. Comstock deposited with the Bank of Del Norte the sum of $3535.00 and received the bank's certificate of deposit therefor, due in ninety days with interest at 4% per annum, but no interest was to accrue or to be paid after maturity. After the maturity of the certificate in 1921,

Mrs. Comstock met her death in a sleeping car and her personal effects which she had with her were burned. The certificate of deposit was lost or destroyed.

Held.—The bank is liable for the amount of the certificate of deposit with interest to date of maturity, but is not liable for interest after maturity. The Statute of Limitations having run against the certificate, it was not necessary to give an indemnity bond to the bank.

Judgment affirmed.

FORECLOSURE — RECEIVER — No. 12,090—*Stevens vs. Realty Loan & Finance Company—Decided June 3, 1929.*

Facts.—A deed, absolute in form, was given by defendant below to plaintiff below, to secure the payment of a debt. The deed was in fact a mortgage. The deed conveyed the property together with the rents, issues and profits thereof. The property being insufficient in value to discharge the encumbrances against it and the defendant insolvent, the court below appointed a receiver .

Held.—Evidence sufficient to justify the appointment of a receiver.

Judgment affirmed.